IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28-06-2006

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE JAICHANDREN

O.S.A.NOs.279 & 280 OF 2001

1. G. Jayaraman
2. M. Rani
3. M. Raghavan
4. M. Jagannathan
5. M. Rajaraman .. Appellants in both OSAs
(Defendants)

Vs.

1. Ranganayagi
2. Kothainayagi
3. Kumathivathi .. Respondents in both OSAs

Appeals filed under Order 36 Rule 1 of O.S. Rules against the judgment and decree of the learned single Judge dated 29.1.2001 in C.S.No.1779 of 1993 and TOS No.34 of 1999 (OP.No.377 of 1996)

For Appellants : Mr.K. Ramu

For Respondents : Mr.P.B. Balaji

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COMMON JUDGMENT

P.K. MISRA, J

These two appeals have been filed against the common judgment passed by the learned single Judge dated 29.1.2001 in C.S.No.1779 of 1993, hereinafter referred to as "C.S." and T.O.S.No.34 of 1999, hereinafter referred to as "T.O.S.".

2. C.S.No.1779 of 1993 has been filed by three daughters of late Govindasamy Naidu claiming partition in respect of the property of Govindasamy Naidu, in whose name admittedly the property stood. Defendant No.1 and late G. Madhavan were two sons of late Govindasamy Naidu. The legal heirs of G. Madhavan were impleaded as Defendants

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2 to 5. According to the plaintiffs' case, their mother Mrs.G. Abranji Ammal, wife of Govindasamy Naidu, died intestate on 10.5.1982 and subsequently their father Govindasamy Naidu died on 15.3.1984. It has been stated in the suit for partition that the late parents of the plaintiffs had not executed any Will out of their own free will and volition and the first defendant in connivance with his brother late G. Madhavan procured a Will with a view to deprive the plaintiffs' share in the disputed property. On the basis of such assertion, the plaintiffs claimed 1/5th share each and also mesne profits and other ancillary reliefs.

3. Defendants in their joint written statement filed in the month of August, 1996, while not disputing the fact that the property was that of Govindasamy Naidu and regarding the dates of death, took the plea that Govindasamy Naidu and his wife Abranji Ammal had jointly executed a registered Will dated 27.1.1982 whereunder the suit property had been bequeathed in favour of the first defendant and Madhavan, the other son. It was stated that the Will had been voluntarily executed. It was also disclosed that the first defendant had an accident, wherein one of his hands had been amputated and the brother Madhavan was not earning well and the plaintiffs were given in marriage and were in affluent circumstances and keeping in view all these, the parents had executed the Will in favour of two sons.

4. Before filing such written statement, the defendants in the suit for partition filed had filed a petition in February, 1996 for grant of probate in respect of the registered Will, which has been subsequently numbered as T.O.S.No.34 of 1999.

5. Plaintiff No.1 in the partition suit who was arrayed as Respondent No.1 in T.O.S.No.34 of 1999, filed a written statement challenging the validity of the alleged will. It has been stated in her written statement that the

application for probate had been filed belatedly. It was further stated as hereunder :-

The Testator as well as the Testatrix were not in sound disposing state of mind in January, 1982 and the brothers of the defendants have taken them to the Sub Registrar Office and got the Will executed and the parents have executed the Will not knowing the contents of the Will. The parents were not keeping good health. The defendants upon enquiry had learnt that the Testatrix was physically carried to the Sub Registrar Office by one Kumar Nair who had witnessed the sale deed dated 20.8.1962 and the Testatrix was not in a sound and disposing state of mind. In the Will itself there is no mention about the existence of any defendant and that there were many suspicious circumstances.

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6. Both the matters were heard together and taken up for disposal by the learned single Judge. Learned single Judge disbelieved the genuineness of the Will and decreed the suit for partition. The son and the legal representatives of the late son of the original owner have filed these appeals against such common decision.

7. The result in both the appeals obviously depends upon the genuineness of the Will. If the Will is found to be genuine, the suit for partition filed by the daughters is bound to fail. On the other hand, if the Will is found to be not genuine, then the decree regarding partition has to be sustained.

8. Learned single Judge has discarded the Will mainly on the ground that disposition of property in favour of two sons completely excluding the daughters is unnatural, probate of the Will has been sought for after long lapse and the evidence relating to execution of the Will is not acceptable in view of the various discrepancies. All these reasonings of the learned single Judge have been attacked by the learned counsel appearing for the appellant.

9. It is no doubt true that under the Will the property was bequeathed in favour of two sons even without mentioning anything about three daughters. However, merely because the three daughters have been ignored, the Will, if otherwise found to have been duly executed, cannot be discarded. Since the Will was in respect of a dwelling house, which was obviously under the occupation of the two executants as well as both the sons, excluding the married daughters, cannot be considered as very unnatural.

10. The criticism of the learned single Judge to the effect that the Will was putforth at a very belated stage is also of very little consequence in the peculiar facts of the present case. If on any particular occasion Will surfaces belatedly, there may be some suspicion as to whether the Will has been executed or has been subsequently manufactured. In the present case, the Will has been registered. There is no suggestion that the signature and the thumb impression on the Will are not of the two executants. Even though the proceedings for probate were taken up belatedly, from the materials on record it is apparent that on the basis of the Will the two sons got their names recorded in the Municipal papers soon after the death of the father. In such view of the matter, it cannot be said that the Will has unexpectedly surfaced after a long gap. Moreover, the daughters were apparently aware of the Will when the suit for partition was filed.

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11. The Will has been attested by two persons out of whom admittedly one attesting witness was dead and the other attesting witness was examined as P.W.1 in T.O.S.No.34 of 1999. According to the evidence of such witness, the two executants had gone to the Office of the Sub Registrar. The attesting witness had stated that he was known to the executants, particularly Govindasamy Naidu, and he had cordial relationship with the husband of Defendant No.1, one of the daughters. Such evidence is not challenged. Therefore, his statement that he was taken by the executants to the Sub Registrar's Office for the purpose of attesting the Will can be considered as normal. As per the evidence of P.W.1., the Will was drafted by a Document Writer in the Sub Registrar's Office and such Will was executed by Govindasamy Naidu after he read over the document which was in Tamil. He has further stated that Abranji Ammal, the wife of Govindasamy Naidu, put her thumb impression as she had joint pain in the fingers and she could not hold the pen to sign. D.W.1., one of the daughters, has admitted in her evidence that the attesting witness P.W.1 and the other attesting witness were friends of his father. She further admitted that P.W.1, the attesting witness is also his husband's friend and her parents were not of unsound mind. She has further admitted that there was "no enmity between us and two attesting witnesses" In such circumstances, the evidence of P.W.1., the attesting witness, relating to execution of the Will, which appears to be natural, cannot be discarded merely because of some minor discrepancies here and there as has been done by the learned single Judge.

12. It is of course true that P.W.1 has stated that the Will was drafted by the writer in the ink and the Will was on stamp paper, whereas the Will was a typewritten one and was on a plain paper. But, this according to us is a minor discrepancy obviously because of the fact that the witness was deposing about the execution long after. Nothing substantial has been elicited to discard the specific evidence of P.W.1 that Govindasamy Naidu had read the Will and signed it in the presence of the two attesting witnesses and similarly the wife of Govindasamy Naidu had put her thumb impression. Merely because certain minor contradictions were made and the witness could not specifically remember about the date or month of the execution of the Will, the sworn statement of such witness, who had no axe to grind against the three daughters and was in fact friendly with the husband of one of the daughters, should not have been discarded. Similarly the fact that this attesting witness had not disclosed anything about the Will to the daughters or the husband of D.W.1 is also not of much significance. The Will was prepared by a document writer in the Office of the Sub Registrar. Even though it was the case of the daughters that the son had taken the parents to the Sub Registrar's Office and there was coercion and undue influence, no such evidence is forthcoming during the trial. As a matter of fact, the evidence of

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P.W.1 to the effect that only two executants and two attesting witnesses had gone to the Sub Registrar's Office and none other had accompanied has not been challenged.

13. In this context, it is required to be noticed that in the written statement opposing the probate the main thrust appears to be the alleged coercion or undue influence. However, there is no evidence whatsoever regarding the alleged coercion or undue influence. Even though certain doubts were raised in the written statement regarding the physical and mental health of the two executants, D.W.1 in her cross-examination has stated that till the death her father used to do his daily activities by himself and likewise till the mother was affected by paralyse, two months before her death, she was taking care of her daily activities without any help. In the absence of any evidence either direct or circumstantial, it must be taken that both the executants were in sound and disposing state of mind.

14. Much was sought to be made of the allegation by the daughters that there was no whisper in the Will about the existence of the daughters or there is no reason as to why the daughters were excluded. Since the Will had been drafted by some writer in the Sub Registrar's Office and not drafted by an Advocate, non-furnishing of these details cannot be taken to be fatal. Similarly it is claimed by D.W.1 that the factum of execution of the Will was not disclosed by the father even though he had lived for about two years after the execution of the Will. This circumstance cannot nullify the positive evidence on record regarding due execution of the Will. It is contended that in view of the admission of P.W.2., the propounder, that the relationship between the daughters and the father was cordial, in normal course, the father after execution of the Will should have disclosed. It is very difficult to delve into human mind in such matters. It is quite possible as submitted by the learned counsel appearing for the appellants that since the property was willed in favour of the two sons and the daughters had been excluded, the father might have thought it advisable to keep quiet in the matter. On the other hand, one has to keep in view the specific allegation of the daughters that there was coercion or undue influence. If actually there was any coercion or undue influence, it would have been more natural for the father to disclose about such aspect to the daughters as they were also close to the father. The circumstance that the father did not disclose anything to the daughter indicates to some extent that there was no coercion or undue influence because it is not the case of the defendants that the alleged coercion and undue influence continued till the death of the father.

15. From the materials on record, it is apparent that one of the sons was physically handicapped as there had been amputation and the other son was not well settled in life. The property was a

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dwelling house. The daughters were already married and there is nothing on record to suggest that the daughters were not well off. In such a background, exclusion of the daughters and settling the dwelling house in favour of the two sons cannot at all considered to be unnatural, more particularly keeping in view the inherent sentiment of a normal Hindu conservative family in such matters.

16. In the written statement a stand has been taken that a sale deed had been earlier executed in 1962 by the mother wherein one Kumar Nair was the attesting witness and such person had been utilised at the time of getting the Will executed from the parents by some method. The materials on record indicate that such Kumar Nair was not an attesting witness to the earlier sale deed. At any rate, even D.W.1 has admitted that such allegation has been made in the written statement on the basis of the information received from some source, but the witness did not have any direct knowledge in the matter.

17. It is of course true that irrespective of the defence taken by the defendants in a probate proceedings, it is for the propounder to prove the due execution of the Will and clear the suspicious circumstances, if any. In the present case, notwithstanding some minor discrepancies in the evidence of P.W.1, it can be held that the execution of the Will has been proved and the so called suspicious circumstances do not merit discarding of the Will which has been registered. Since the defendants have not been able to bring on record any credible evidence to establish coercion or undue influence, conclusion of the learned single Judge cannot be sustained.

18. For the aforesaid reasons, the judgment passed by the learned single Judge is reversed and both the appeals are allowed. Probate shall be granted to the appellants / applicants and C.S.No.1779 of 1993 for partition shall stand dismissed. There is no order as to costs.

dpk

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Deputy Registrar,
Original Side, High Court, Madras.

2. The Sub Assistant Registrar,
Original Side,
High Court, Madras.

3. The Record Keeper,
VR. Section,
High Court, Madras.

2 ccs to Mr.P.B.Ramanujam, Advocate, SR.Nos.27497 and 27496
2 ccs to Mr.K.Ramu, Advocate, SR.27762

pv (co)

dv/17.7.06

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